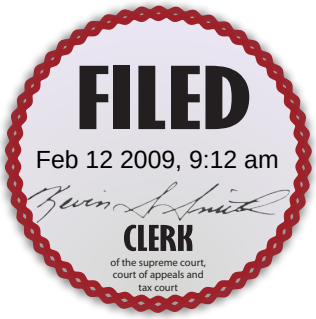

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IN THE
COURT OF APPEALS OF INDIANA

GLORIA C. DICKEY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A04-0807-CV-424
	)	
DAVID J. DICKEY	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Michael P. Scopelitis, Judge
Cause No. 71D07-0307-DR-328

February 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gloria C. Dickey appeals the denial of her motion to correct error that challenged the trial court's order reducing and then eliminating her ex-husband's, i.e., David Dickey's, obligation to pay spousal maintenance to her. Gloria presents the following restated issues for review:

> 1. Did the trial court err in determining that David had established a substantial and continuing change of circumstances warranting a modification of his spousal maintenance obligation?
>
> 2. Did the trial court determine that David's maintenance obligation would terminate without affording Gloria an opportunity to he heard on the issue?

We affirm.

The facts favorable to the judgment are that Gloria and David were divorced via a decree of dissolution entered on May 18, 2006. Incorporated into the decree was a Property Settlement Agreement (the Agreement) submitted by the parties resolving all of the then-pending issues, including the division of marital property, child custody, and support matters. At the center of this appeal is Paragraph 20 of the Agreement, which provided that David would pay Gloria $1,250.00 per month as "rehabilitative maintenance." *Appellant's Appendix* at 7. On October 26, 2007, David filed a Petition to Modify Rehabilitative Maintenance on grounds that there had been a substantial and continuing change of circumstances. A hearing was conducted on David's petition on March 10, 2008. On March 18, the trial court entered an order that provided, in relevant part, as follows:

> 1. The rehabilitative maintenance order heretofore entered is modified from $1,250 per month to $400 per month retroactive to October 26, 2007.

2. The final rehabilitative maintenance payment shall be due by father to mother on May 15, 2009.

3. The rehabilitative maintenance arrearage shall be recalculated by the parties based upon the retroactive modification of the order and preserved for payment to wife at the rate of $400 per month starting on May 22, 2009 and payable each month thereafter until paid in full.

* * * * *

5. Sentencing on contempt is continued indefinitely to be reset upon request of wife in the event that father fails to make the monthly rehabilitation maintenance payment as modified by this order.

Id. at 24. On April 17, 2008, Gloria filed a motion to correct error, premised essentially upon the same arguments that Gloria asserts on appeal. The trial court denied the motion to correct error and this appeal ensued.

As an initial matter, we note that David did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for him and we apply a less stringent standard of review with respect to showings of reversible error. *Zoller v. Zoller*, 858 N.E.2d 124 (Ind. Ct. App. 2006). We may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

1.

Gloria contends the trial court erred in determining that David had established a substantial and continuing change of circumstances warranting a modification of his spousal support obligation.

The resolution of Gloria's claims concerning the maintenance modification rests

largely upon the interpretation of Paragraph 20. Because this case turns on the correct interpretation of that provision, we apply well-settled principles of contract interpretation and the appropriate standard of appellate review. "Settlement agreements are governed by the same general principles of contract law as any other agreement." *Fackler v. Powell*, 891 N.E.2d 1091, 1095 (Ind. Ct. App. 2008). We have a duty to interpret a contract so as to ascertain the intent of the parties. *McLinden v. Coco*, 765 N.E.2d 606 (Ind. Ct. App. 2002). In interpreting a written contract, we will attempt to determine the intent of the parties at the time the contract was made, as disclosed by the language used to express their rights and duties. *Id*. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. Our standard of review of the interpretation of an unambiguous contract is de novo. *Id*. On the other hand, if a contract is ambiguous or its terms uncertain, and if the meaning of the contract is to be determined by extrinsic evidence, its construction is a matter for the factfinder. Rules of contract construction may be used and extrinsic evidence considered in giving effect to the parties' reasonable expectations. *Id*. If the ambiguity arises because of the language used in the contract and not because of extrinsic facts, then its construction is purely a question of law to be determined by the trial court. *Id*. When we find a contract to be clear in its terms and the intentions of the parties apparent, the court will require the parties to perform consistently with the bargain they made.

In the instant case, the controversial portion of the Agreement is Paragraph 20, which states as follows:

> 20. Rehabilitative Maintenance. The Husband shall pay to the [W]ife the sum of $1,250.00 per month as rehabilitative maintenance. This payment shall

> continue in effect until Wife remarries, dies or this provision is modified or terminated. Husband shall have a right to review this provision in accordance with I.C. 31-15-7-3. This maintenance payment includes an amount equal to Wife's automobile lease and insurance payments. The current spousal maintenance arrearage is preserved. Husband agrees to pay to wife the full arrearage within 1 year. There shall not be interest on this amount.

Appellant's Appendix at 7-8. The trial court determined that the foregoing maintenance order (a) was modifiable without both parties' consent and (b) would lapse after three years by operation of law. Gloria contends the court erred in both respects. According to Gloria, Paragraph 20 represents an agreement that David would pay maintenance based upon Gloria's incapacity. As such, according to Gloria, the order was not modifiable unless there was evidence that her incapacity had abated. Alternatively, Gloria contends the parties agreed to a kind of maintenance that the trial court could not have imposed of its own accord. Thus, the argument goes, it could not be modified without both parties' agreement. In either case, it would not automatically lapse after three years.

There are two ways in which a divorcing spouse may be obligated to make spousal maintenance payments: (1) under limited circumstances, by court order, and (2) under all other circumstances, by agreement of the parties. With respect to the first category, a trial court may award only three limited varieties of post-dissolution maintenance: spousal incapacity maintenance, caregiver maintenance, and rehabilitative maintenance. *See* Ind. Code Ann. § 31-15-7-2 (West, PREMISE through 2008 2nd Regular Sess.). Germane to this appeal, a court may award incapacity maintenance, "[i]f [it] finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected". I.C. § 31-15-7-2(1). Gloria contends Paragraph 20

of the Agreement represents precisely that: incapacity maintenance. If such is the case, a court may order incapacity maintenance to be paid for the entire period of incapacity, subject to further order of the court. *See Dewbrew v. Dewbrew*, 849 N.E.2d 636 (Ind. Ct. App. 2006).

The second type of maintenance germane to this appeal is rehabilitative maintenance. A court may order rehabilitative maintenance if it finds that a spouse needs support while acquiring sufficient education or training to get an appropriate job. I.C. § 31-15-7-2(3). At the hearing on the motion to correct errors, David contended that Paragraph 20 of the Agreement represented rehabilitative maintenance. Such an award cannot last longer than three years. *See id*.

The third option we must consider is that Paragraph 20 represents a type of maintenance that the court could not otherwise have ordered, such as, for example, something akin to alimony. In its seminal opinion on spousal maintenance, our Supreme Court in *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. 1996), held that modifying such an award of spousal maintenance can occur only if both parties acquiesce, i.e.:

> Where a court has no authority to impose the kind of maintenance award that the parties forged in a settlement agreement, the court cannot subsequently modify the maintenance obligation without the consent of the parties. In essence, the parties must agree to amend their settlement agreement, because the sole authority for the maintenance obligation originally derived from their mutual assent. In approving or rejecting any submitted modification agreement, a court should apply the same standard it would use in evaluating an initial settlement.

Id. at 1280. Later, in *Zan v. Zan*, 820 N.E.2d 1284 (Ind. Ct. App. 2005), we concluded that a court can, without both parties' approval, modify a spousal maintenance obligation that arose under a previously approved settlement agreement if the court could initially have imposed

that same obligation without the parties' voluntarily agreement.

Thus, the propriety of the court order modifying maintenance in the instant case depends entirely upon the designation of the original award of maintenance it purports to modify – and to which the parties acquiesced in the Agreement. If it was incapacity maintenance, the court arguably could modify it without both parties' agreement if the court determined that the incapacity had ended. If it was rehabilitative maintenance, the court arguably could, under certain circumstances, modify the award without both parties' agreement and, in any event, the obligation *must* terminate after three years. Finally, if the award was of a kind the court could not have awarded without the parties' agreement, then there can be no modification without both parties' agreement.

In reviewing the pertinent facts, we start with the Agreement itself. In Section D, the parties agreed that, although David was to have physical custody of the children, Gloria would not pay child support "[d]ue to [her] inability to have gainful employment." *Appellant's Appendix* at 4. The parties agreed that the issue of child support was reviewable "if and when [Gloria] is able to obtain employment." *Id*. The only other pertinent information to be found in the Agreement is contained in Paragraph 20, which as indicated above labeled the obligation as "rehabilitative maintenance", *id*. at 8, and provided that the obligation was to continue until Gloria died or remarried, or until the obligation was modified or terminated. Further, Paragraph 20 indicated that the amount of the obligation essentially represented the sum of Gloria's "automobile lease and insurance payments." *Id*. We can find no other material in the record to illuminate the parties' respective intents concerning

Paragraph 20 at the time the Agreement was negotiated and executed. All that is available to us are the arguments made by the parties at the subsequent hearing on David's motion to modify concerning the type of maintenance to which the parties had agreed and, to a lesser extent, the parties' arguments at the hearing on Gloria's motion to correct error.

Reviewing the testimony given during the course of the modification hearing, we can glean but little concerning the facts giving rise to the maintenance agreement. Mention is made of Gloria's alcoholism and mental health issues, but those concerned the time after the divorce decree was entered and before David filed his modification petition. Similarly, no mention is made of facts that would support the conclusion that the maintenance payments were intended to allow Gloria to acquire skills or education necessary to support herself independently - nothing, that is, but the label attached by the parties.

In short, beyond the label, we have scant evidence from which to determine what sort of maintenance David and Gloria agreed to in the first place. On these facts, we are inclined to agree with the trial court that the label affixed by the parties takes on pre-eminent importance. In this context, "rehabilitative maintenance" is a term of art that carries with it a specific meaning. *See* I.C. § 31-15-7-2(3). It is distinguishable from maintenance authorized in different circumstances with different criteria. As both parties were represented by counsel in drafting the Agreement,[1] we must presume, in the absence of evidence to the

[1] In colloquy with the court, David's counsel stated: "I was not involved in the preparation of this order [i.e., the Agreement] there was another attorney at that time …." *Transcript* at 61. Later, in considering what the parties intended in Paragraph 20, the trial court noted:

> You know what, that was certainly the only thing that stands out in my mind, but I can't say that that's all there was because I never had a trial. I don't know what issues may have been

contrary, that "rehabilitative maintenance" was understood and intended to mean the term defined in I.C. § 31-15-7-2(3). Clearly, the trial court concluded such was precisely what the parties intended because it ordered that the Paragraph 20 obligation terminates as a matter of law after three years. *See id*. Based upon the label attached to it and lacking any evidence to support a different interpretation, we affirm those aspects of the trial court's judgment, i.e., that Paragraph 20 represents an award of rehabilitative maintenance under I.C. § 31-15-7-2(3), and that it expires no later than three years after the entry of the decree of dissolution.

Having reached those preliminary conclusions, we turn now to the question of whether the trial court erred in modifying David's rehabilitative maintenance obligation. Gloria contends "the trial court abused its discretion when it determined [David] had established a substantial and continuing change in circumstances warranting a modification of [David's] … support obligation." *Appellant's Brief* at 6. The purpose of rehabilitative maintenance is to afford a divorcing spouse the means by which "to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment[.]" I.C. § 31-15-7-2(3)(D). Gloria correctly observes that, in order to support modification, the trial court was required to consider the factors relevant to deciding whether the obligation should have been imposed in the first place. Those factors include:

> (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
> (B) whether an interruption in the education, training, or employment of a

---

> raised or discussed between the lawyers relating to her ability to be educated, reeducated, trained, retrained, I don't know. I just don't know. But these are terms of art.

Id. at 62-63.

> spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both; [and]
> (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market[.]

I.C. § 31-15-7-2(3). Moreover, the parties stipulated in the Agreement that the obligation imposed in Paragraph 20 was modifiable "in accordance with I.C. 31-15-7-3." *Appellant's Appendix* at 8. That provision states, in relevant part: "modification may be made only … upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable[.]" I.C. § 31-15-7-3(1) (West, PREMISE through 2008 2nd Regular Sess.).

Even assuming for the sake of argument that Gloria is correct in asserting that David did not present evidence pertinent to the factors set out in I.C. § 31-15-7-2(3)(A)-(C), the trial court's order is sustainable. This court has held that an order of rehabilitative maintenance may be eliminated altogether where the purpose of the award, i.e., to enable the former spouse to attend educational or vocational training program, is not being realized. *See Zan v. Zan*, 820 N.E.2d 1284 (former wife apparently used maintenance payments as means of supporting herself rather than using payments to obtain an education). If elimination of the obligation is appropriate where the purpose of rehabilitative maintenance is not being achieved, then certainly reducing the amount of a rehabilitative maintenance obligation on that basis is permissible.

In this case, there was no evidence that Gloria was using the money for education or vocational training purposes. In fact, Gloria had moved in with her parents when she was jailed for repeated arrests for driving while intoxicated. Her parents "washed their hands of

her and her situation" and informed her that upon her release she would no longer be allowed to live with them. *Transcript* at 43. Also, although Gloria had at one time taken an internet course or courses, there was no evidence that she was still pursuing an education or vocational training when David filed his modification petition. On this basis, we affirm the reduction of David's rehabilitative maintenance obligation.

2.

Gloria contends the trial court erred in terminating David's support obligation without affording her an opportunity to be heard on the issue. Gloria claims:

> But the wife did not have an opportunity to address the issue of when the spousal support obligation should terminate. At the conclusion of the evidentiary hearing on the husband's petition to modify rehabilitative maintenance the trial court and counsel discussed the nature of the post-dissolution maintenance order – whether it was "rehabilitative" or "incapacity" – related, and whether the nature of the order determined whether it is "modifiable[.]"

Appellant's Brief at 9. We have reviewed the transcript of the hearing on David's motion for modification and cannot agree that Gloria's counsel did not have an opportunity to present argument on this issue. Counsel not only had the opportunity, but seized it. The transcript reflects counsel clearly recognized that the court was openly considering the issue of whether Paragraph 20 constituted rehabilitative maintenance within the meaning of I.C. § 31-15-7-2. Counsel argued forcefully that it was *not* rehabilitative maintenance within the meaning of that statute, but was instead either incapacity maintenance or what amounts to alimony. We note also that the court subsequently conducted a hearing on Gloria's motion to correct error, in which the subject was once again addressed. We understand that Gloria points to some of

the court's comments during the hearing on David's motion to modify in which it alluded to the possibility of conducting future hearings to facilitate its decision. Those comments were equivocal in nature and certainly did not bind the court to that course of action. In the end, the court determined, after argument to the contrary by Gloria's counsel, that Paragraph 20 constituted an agreement that David would pay rehabilitative maintenance. Implicit in this decision was its conclusion that it had sufficient information to make that determination. The court did not err in that respect.

In summary, Gloria has not demonstrated prima facie error in the trial court's conclusions that (1) Paragraph 20 constituted an award of rehabilitative maintenance under I.C. § 31-15-7-2 that will terminate by operation of law three years after it was entered, and (2) the order was modifiable prior to its termination under terms of the Agreement.

Judgment affirmed.

BRADFORD, J., concurs.

MAY, J., concurs in part and dissents in part with opinion.

IN THE
COURT OF APPEALS OF INDIANA

GLORIA C. DICKEY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A04-0807-CV-424
	)	
DAVID J. DICKEY,	)	
	)	
Appellee-Petitioner.	)	
	)	

MAY, Judge, dissenting

Because I believe the modification of maintenance was error, I must respectfully dissent. As for the second issue, I agree with the majority's result, but write to address Gloria's due process argument.

Unlike the majority, I would not undertake the task of labeling the maintenance provided in this Property Settlement Agreement. Gloria does not take issue with the trial court's determination that Paragraph 20 of that agreement was "rehabilitation maintenance" as defined in Ind. Code § 31-15-7-2(3). Neither has she questioned the trial court's authority to modify the terms of that maintenance order. Accordingly, I would not address those issues

sua sponte as does the majority.[2] I would instead address Gloria's straight-forward argument that there was insufficient evidence of a substantial and continuing change of circumstances warranting modification of the maintenance.

I believe the trial court erred when it found "a change of circumstances so substantial and continuing as to make the rehabilitative maintenance order unreasonable." (App. at 24.) To determine whether there has been a substantial change in circumstances, a court should consider "the financial resources of the party seeking to continue maintenance, the standard of living established in the marriage, the duration of the marriage, and the ability of the spouse paying maintenance to meet his or her own needs." *Mitchell v. Mitchell*, 875 N.E.2d 320, 323 (Ind. Ct. App. 2007), *trans. denied sub nom. Mitchell v. Zamarron*, 891 N.E.2d 39 (Ind. 2008).

The record does not reflect Gloria's financial situation at the time of the agreement, but she was unemployed and living in a women's shelter at the time of the hearing; this suggests Gloria's financial circumstances had not improved since the time of the agreement. At the end of the parties' twenty-one-year marriage,[3] David was making approximately $100,000 per year in the form of a base salary of $60,000 and bonus of $40,000. (Tr. at 10.) When David entered the maintenance agreement, he was living rent-free with family and

[2] Even if Gloria had questioned the court's authority to modify the maintenance order, I believe we could answer that question without addressing what type of maintenance was created or whether the maintenance was a type the court could have awarded because David and Gloria consented to future modification of the maintenance in the same paragraph of the agreement that created the maintenance. *See Voigt*, 670 N.E.2d at 1280 (where the court had no authority to award the maintenance, "the parties must agree to amend their settlement agreement").

[3] The Decree of Dissolution, entered on May 18, 2006, indicates the parties were married on August 15, 1985.

earning $65,000 per year, while at the time of the modification request, David had a job that paid approximately $81,000 per year. Therefore, David arguably was making more at the time of his modification request than he was making when he entered the maintenance agreement. Nevertheless, David asserted a right to modification because his living expenses increased in Florida when he and his new wife purchased a $230,000 house with two mortgages totaling $2,600 a month. I agree with Gloria that it is "unreasonable for [a party] to claim financial hardship . . . when the 'hardship' is a result of [a] conscious decision." (Appellant's Br. at 8.) David knew he had a monthly obligation to Gloria and he was not meeting that obligation when he bought the new house; he nevertheless chose to take on a $2,600 monthly mortgage obligation. I would not condone David's conscious manipulation of his financial situation by affirming a modification of his original obligation to Gloria.

To affirm the modification of the order, the majority holds the agreement was for rehabilitation maintenance and notes "rehabilitative maintenance may be eliminated altogether where the purpose of the award, i.e., to enable the former spouse to attend educational or vocational training program, is not being realized." *See slip op.* at 10 (citing *Zan*, 820 N.E.2d at 1284). The majority then asserts "there was no evidence that Gloria was using the money for education or vocational training purposes," *id.*, and "although Gloria had at one time taken an internet course or courses, there was no evidence that she was still pursuing an education or vocational training when David filed his modification petition." *Id.* at 11.

It was not Gloria's burden to prove she was still pursuing education or vocational

training with David's money; rather, David had the burden to demonstrate a change of circumstances supporting modification. *See* Ind. Code § 31-15-7-3 ("modification may be made only: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable"). Only David testified in support of his petition, and his only testimony regarding Gloria's pursuit of education or vocational training came on redirect examination:

> Q. Was there a time since you've been separated that she was employed or going to school?
> A. Since we've been separated she had been going to school.
> Q. In Oregon?
> A. In Utah.
> Q. In Utah?
> A. Yes.
> Q. I'm sorry.
> A. It's not what I would call a traditional go to class school, it was internet classes.

(Tr. at 43-44.) David was not asked whether Gloria was continuing to pursue internet courses or some other form of vocational training, and the meager evidence before us does not support an inference that Gloria was not pursuing education or vocational training.[4]

The evidence does suggest, however, Gloria had not received sufficient maintenance payments from David to enroll in any educational courses.[5] Rather, as the trial court found, David "failed to make even a reasonable effort to pay the rehabilitative maintenance order."

[4] Neither would I infer that fact from David's brief testimony that Gloria was in jail for repeated drunk driving during "December [2007] and part of January [2008]." (Tr. at 43.)

[5] Twenty-two months passed between the May 2006 maintenance order and the hearing in March 2008. If David had not paid any of his $1,250 monthly support obligation, he would have accumulated an arrearage of $27,500. In contrast, the parties agreed at the hearing that David's debt to Gloria was "probably close" to "$37,200." (Tr. at 68.) Accordingly, David had not only failed to regularly pay Gloria's on-going maintenance, he owed her substantial sums accumulated before the dissolution order was entered.

(*See* Appellant's App. at 24, Para. 4.) Accordingly, I disagree with the majority's decision to hold a woman responsible for inappropriately using money she was entitled to but never received.

As for the second issue, I agree with the majority that Gloria was not deprived of an opportunity to be heard. However, I wish to address an additional aspect of Gloria's argument. It appears Gloria is asserting she should have had a right to appear personally before the court to testify regarding what type of maintenance the parties agreed to. I would reject Gloria's due process argument because the record suggests she should have appeared at the hearing in March 2008 if she wished to testify regarding that matter.

David filed a "Petition to Modify Rehabilitative Maintenance," (Appellant's App. at 12), to which Gloria did not respond. After evidence was presented, her counsel argued the court could not modify the amount because it was incapacity maintenance, not rehabilitation maintenance. (*See* Tr. at 54-57.) If Gloria, or her counsel, believed her testimony was necessary to help the court resolve that issue, then Gloria should have appeared at the March 2008 hearing to defend against David's motion. As she did not appear, the court did not deny her due process by declining to schedule another hearing. I accordingly concur in the majority's resolution of this issue.